

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

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FILE: B-182810

DATE: June 10, 1975

MATTER OF: Sauk Valley Mfg. Co.

DIGEST:

1. Question of whether supplies under contract are still needed is matter for contracting agency to determine in accordance with its obligation to properly administer contract. Moreover, decision made in this regard as to whether or not any given contract should be terminated for convenience of Government rests with contracting agency.
2. Inclusion of price escalation clause which limited price increase to 25 percent of original price was not done by mutual mistake since Government did not intend to compensate contractor for all increases in costs but rather merely intended to share the risk of possible price increase with contractor.
3. Reformation of contract on grounds of mutual mistake is permissible only when there has been mutual mistake as to past or present material fact. Mistakes pertaining to future events, such as degree of cost escalation in fixed-price contract containing limited escalation provision, do not constitute grounds for reformation.
4. Contention that contracting officer arbitrarily set escalation limit in fixed-price contract, should have been raised prior to bid opening as required by 4 C.F.R. § 20.2 (1974), and not in midst of contract performance.
5. Claim for relief by fixed-price Government contractor suffering inflationary pressures is not extraordinary claim for consideration under Meritorious Claims Act.
6. Our Office cannot review agency's findings under Pub. L. 85-804 since we are not one of Government agencies authorized by statute or implementing Executive Orders to modify contracts without consideration.

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PUBLISHED DECISION
54 Comp. Gen. 1111

The Sauk Valley Mfg. Co. (Sauk Valley) was awarded three contracts by the Defense Supply Agency (DSA), each calling for delivery of a specified quantity of barbed wire on a fixed-price basis. Subsequent to the award of these contracts the price of steel greatly increased and it became difficult for Sauk Valley to perform the contracts at the prices specified. Sauk Valley therefore sought relief from DSA under Pub. L. No. 85-804 (August 28, 1958). However, on September 26, 1974, such relief was denied. Subsequently, Sauk Valley submitted a claim to our Office requesting relief under the Meritorious Claims Act of 1928, 31 U.S.C. § 236 (1970); Pub. L. No. 85-804; or any other relief permissible under our jurisdiction.

We note at the outset that contract No. DSA700-73-C-0313, which was initially included in Sauk Valley's request for relief, has since been terminated for mutual convenience at no cost to either party pursuant to ASPR § 8-602.4 (1974 ed.). However, Sauk Valley still seeks relief with respect to contracts DSA700-73-C-4908 and DSA700-73-C-3156.

DSA700-73-C-4908

Contract No. -4908 was awarded to Sauk Valley on March 12, 1973. The contract provided for a 100-percent option which was exercised by the Government. To date the contract has been partially performed. However, Sauk Valley now seeks a no-cost termination for the unperformed portion of the contract on the grounds that the supplies are no longer required by the Government.

The question of whether the supplies are in fact still needed is a matter for the agency to determine in accordance with its obligation to properly administer the contract. Moreover, a decision made in the course of contract administration as to whether or not any given contract should be terminated for the convenience of the Government rests with the contracting agency. Veterans Administration, B-108902, May 17, 1974. Therefore, we would not object to such a termination if indeed the supplies are no longer required. However, that determination must be made by the contracting agency.

DSA700-73-C-3156

On January 18, 1974, Sauk Valley was awarded contract No. -3156 on a fixed-price basis for a specified quantity of barbed

wire. In accordance with DSA policy effective as of the contract date, the contract provided that each contract unit price would be subject to revision in order to reflect changes in the cost of steel but the total of the increases was not to exceed 25 percent of the original applicable contract unit price. Since DSA policy now provides for a 50-percent limitation on price increases in contracts for steel products, Sauk Valley seeks a contract amendment which would substitute the 50-percent limitation for the 25-percent limitation contained in its contract. Sauk Valley contends that the inclusion of the 25-percent limitation was done by mutual mistake since both parties intended that the Government compensate the contractor for any and all increases in cost due to a rise in steel prices. Sauk Valley contends that this intention is evidenced by the following factors: (1) DSA's inclusion of an escalation clause in the contract; (2) the requirement for the contractor to represent that the unit prices set forth in the contract did not include any contingency allowance to cover the possibility of increased cost of performance resulting from increases in the price of steel required during the performance of the contract; and (3) the prior course of dealings between DSA and Sauk Valley.

However, we believe that these circumstances evidence an intention to limit contract price increases to the stated 25 percent. Although an escalation clause was included in the contract, it was specifically and intentionally limited to 25 percent. Sauk Valley was required to represent that the original unit prices did not include any contingency allowance to cover possible increases in the price of steel required during the performance of the contract. The fact that DSA required Sauk Valley to make such a representation establishes DSA's intention not to assume the burden of a steel price increase in excess of 25 percent but merely to share the risk of possible price increases with the contractor. That is, all price increases in excess of 25 percent would be assumed by the contractor out of its own corporate funds and DSA would not indirectly pay for these increases through the inclusion of contingencies by the contractor in the original contract price.

Previous dealings between DSA and Sauk Valley have been based on a similar method of risk allocation. All three of the contracts between DSA and Sauk Valley which have been brought to our attention have been fixed-price contracts which would not entitle the contractor to any additional compensation if the cost of performance

increased since fixed-price contractors assume the risk of subsequent price increases. The R. H. Pines Corporation, B-181599, December 26, 1974; B-173925, October 12, 1971. See 53 Comp. Gen. 187 (1973); Penn Bridge Co. v. United States, 59 Ct. Cl. 892 (1924). Moreover, even though Sauk Valley has previously entered into fixed-price DSA contracts containing escalation clauses, the escalation of prices was always limited to a specified percentage of the original contract unit price. By using these percentage limitations, DSA has set a policy of expressly limiting its share of risk allocation.

We conclude that the course of dealing between DSA and Sauk Valley reveals that the actual intention of the parties was expressed in the written contract and there was no mutual mistake of fact. Furthermore, reformation of a contract is only permissible when there has been a mutual mistake as to a past or present material fact. 17 C.J.S. Contracts § 135 (1963). See B-177658, April 30, 1973; B-167951, April 21, 1970. Mistakes pertaining to future events do not constitute grounds for reformation. Indeed, one who contracts in reliance upon opinions or beliefs concerning future events assumes the risk that his conjectures will be proven unjustified. B-177658, supra, B-167951, supra.

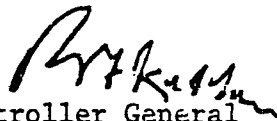
Sauk Valley also contends that the contracting officer acted arbitrarily in setting the 25-percent escalation limitation. However, this contention should, in accordance with 4 C.F.R. § 20.1 (1974), have been raised prior to bid opening and not in the midst of contract performance.

With regard to Sauk Valley's request for relief under the Meritorious Claims Act of 1928, our Office has consistently refused to report claims to Congress under that Act unless the claim is of an unusual nature and is unlikely to constitute a recurring problem. B-175278, April 12, 1972. We have held that a claim for relief by a Government contractor who is experiencing increased costs in attempting to meet its contractual commitments to the Government is not an extraordinary claim for consideration under the Meritorious Claims Act. 53 Comp. Gen. 157 (1973); B-179309, October 2, 1973.

As to Sauk Valley's request for relief under Pub. L. 85-804, it must be noted that our Office is not authorized by that statute and implementing regulations to amend or modify contracts without consideration to facilitate the national defense. Trio Chemical Works, B-172531, August 14, 1974. Furthermore, administrative

decisions granting or denying relief under Pub. L. 85-804 are not subject to review by our Office and due to the absence of specific authority are binding upon us. Trio Chemical Works, supra. Accordingly, Sauk Valley's request under Pub. L. 85-804 need not be further discussed.

For the reasons stated above Sauk Valley's request for relief is denied. However, we note that legislation has been introduced in Congress which would grant relief to small businesses committed to fixed-price Government contracts which have encountered significant and unavoidable difficulties during the performance of their contracts because of rapid and unexpected cost escalation. See H. R. 2879, 94th Cong., 1st Sess. (1974); H. R. 3207, 94th Cong., 1st Sess. (1974); H. R. 4544, 94th Cong., 1st Sess. (1974); H. R. 3886, 94th Cong., 1st Sess. (1974); S. 1259, 94th Cong., 1st Sess. (1974).


Acting Comptroller General
of the United States